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Supreme Court of the United States

OCTOBER TERM, 1958.

No. 754

THE TAFT HOTEL CORPORATION,

Petitioner,

—vs.—

HOUSING AND HOME FINANCE AGENCY, ALBERT M. COLE, Administrator of the Housing and Home Finance Agency, FRANK O'BRION, HARRY BARNET, ANDREW EUSTON, FRED W. WATERMAN, JR., MATTHEW RICOPPOLO, constituting the New Haven Redevelopment Agency and the City of New Haven,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

To The Honorable Chief Justice And Associate Justices Of The Supreme Court Of The United States:

Petitioner, The Taft Hotel Corporation, requests that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on December 31, 1958.

Opinions Below.

The opinion of the Court of Appeals, Second Circuit, appended hereto (pp. 1a-3a, Appendix A) is reported in F. 2d — (not reported as yet). The opinion of the District Court of Connecticut is reported in 162 F. Supp. 538. A form of opinion was rendered by the Federal Housing Administrator on the plaintiff's protest. That is annexed to the complaint (pp. 18a-20a, Transcript Appendix).

Jurisdiction.

The Judgment of the Court of Appeals was dated and entered on December 31, 1958. The jurisdiction of this Court is invoked under Sec. 1254 (1) and Sec. 2101 (c) of 28 U. S. C.

Questions Presented.

1. When Congress authorized the Federal Housing Administrator to "sue and be sued" under Sec. 1456 (c) 1 of 42 U. S. C., thereby waiving the sovereign immunity of the United States, did it restrict the venue of every action against the Administrator to the United States District Court in Washington, D. C., or did it create the venue exception stated in Sec. 1391 (b) of 28 U. S. C.?

2. Does a District Court Judge who holds, on a motion to quash the service of process on the Federal Housing Administrator made in Washington, D. C., that there is no venue in the District Court of Connecticut, nevertheless have the power to decide the merits of the controversy?

3. Does the Administrative Procedures Act, 5 U. S. C., give an aggrieved person the right to have a judicial review of the actions and conclusions of the Federal Housing Administrator?

4. Is such an aggrieved person automatically without "standing to sue" merely on the presentation of argument—and nothing more—that the determination of the Federal Housing Administrator has only created "lawful competition," irrespective of the asserted violation of authority by the Administrator of Sec. 1451 of 42 U. S. C.?

5. Does Sec. 1731(b) of 12 U. S. C. prohibit the Federal Housing Administrator from authorizing the use of federal funds for the erection of hotels in a Slum Clearance and Urban Renewal Project, under Subchapter II of Chapter 8A, 42 U. S. C.?

The Constitutional Provisions And Federal Statutes Involved.

Constitutional Provision involved is the Fifth Amendment and the pertinent federal statutory provisions involved are, Secs. 1451, 1456(c)1 of 42 U. S. C., Sec. 1391(b) of 28 U. S. C., Sec. 1009 of 5 U. S. C. and Sec. 1731(b) of 12 U. S. C.

Statement Of The Case.

The complaint, consisting of two counts, alleges in the first count, that the plaintiff is the owner and operator of the Hotel Taft located in New Haven, Connecticut; that the Taft is a first-line hotel with approximately 450 rooms, with banquet facilities and the like, which has vacancies of approximately 25% at all times; that the Federal Housing Administrator in authorizing a grant of $13,000,000. and a loan of $25,000,000. to the New Haven Redevelopment Agency and the City of New Haven, violated Sec. 1451 of U. S. C. in having delegated his authority to the New Haven Redevelopment Agency and the City of New Haven, to determine the feasibility, economic and otherwise, of erecting a new 300-room hotel with banquet facilities for 1,000, in the City of New Haven, and (b) that by making his decision without

having himself made or having had made for him even by the delegated New Haven Redevelopment Agency, any survey, economic or otherwise, of the feasibility or economic advisability of erecting such a hotel, his decision was, as a matter of law, arbitrary and capricious in that he had no facts upon which to render any decision, even discretionary, in regard to the erection of a new hotel in the Redevelopment Area.

The second cause of action alleges that the decision of the Administrator in approving the redevelopment project, insofar as it includes the erection of the new 300-room hotel, violates Sec. 1731 (b) of 12 U. S. C. which declares the intent of Congress to be that housing built with the aid of mortgages insured under the National Housing Acts, is to be used principally for residential use which excludes the use of such housing for transient or hotel purposes.

The complaint seeks relief to the extent that the Court judicially review the acts and conduct of the Administrator and upon such review determine that the Administrator acted illegally and in a capricious manner in approving the Redevelopment Project insofar as it includes the erection of the new hotel, and issue a mandatory injunction restraining the Administrator from furnishing any financial assistance in furtherance thereof.

Process instituting the action was served upon Albert W. Cole, Administrator of the Housing and Home Finance Agency, in Washington, D. C., and upon the United States Attorney for the District of Connecticut.

The Courts below in sustaining the motion to quash service have held that the statutory authority to the Administrator to "sue and be sued" does not permit of service of process outside the territorial limits of the State of Connecticut, and also that the plaintiff has no standing to bring the action and have dismissed the complaint on the merits.

The basis for federal jurisdiction in the court of first instance was claimed under the Constitution of the United States and the Statutes of the Congress of the United States, specifically Title 40 and Title 42 U. S. C., Title 12 U. S. C. and Title 5 U. S. C. (p. 2a, Transcript Appendix).

Reasons For Granting The Writ.

I

Question 1—Venue In Actions Against The Federal Housing Administrator.

Sec. 1391 of 28 U. S. C. provides:

"(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, except as otherwise provided by law."

Sec. 1456 (c) (1) of 42 U. S. C. provides:

"(c) In the performance of, and with respect to, the functions, powers and duties vested in him by this subchapter, the Administrator, notwithstanding the provisions of any other law may—

1. sue and be sued;"

When Congress granted authority to the Administrator to "sue and be sued" it necessarily contemplated that any suit by or against the Administrator would be brought in the District Court in which the controversy arose and the subject matter existed. Obviously the Administrator, if he felt aggrieved, for example on some phase of the New Haven Redevelopment Project, could sue only in Connecticut. By the same token, where the Administrator is being sued, it must be assumed that the party entitled to sue is privileged to begin the action in the District Court which embraces the area in which the controversy has arisen.

The activities of the Administrator is the basis of the controversy and if they are to be reviewed by the Courts opportunity to start the judicial process in motion must be afforded. The National Housing Acts cannot be compared or technically reasoned on the same level as statutes intended to control contractual relations between business men, where the convenience of parties plays an important role.

It is inherent in the National Housing Acts that when a controversy arises with the Administrator that there are others involved in such a controversy whose rights are seriously affected and that they too may either wish to be heard or are indispensable parties to an action. In the instant case, the City of New Haven and the New Haven Redevelopment Agency were made parties defendant because it was assumed that not only would they want to join in the defense of the action but also, to anticipate the uniform contention of the Administrator, through the United States Attorney, that the municipality or municipal agencies involved are indispensable parties; parties who obviously cannot be served with process in Washington.

Congress did not entertain any ideas of making it impossible to bring an action against the Administrator in the federal courts because of the technical inability to serve an indispensable party, while the Administrator remained constant in Washington. It is almost absurd to say that an aggrieved person in Juneau, Alaska, seeking redress against an injury by the Administrator, must bring his action in Washington, D. C., and then be frustrated by the claim of the very Administrator that the City of Juneau is an indispensable party but cannot be served in Washington, D. C.

The Administrator does not conduct an office with any degree of local characteristics. He is the Administrator of a vast federal program of Housing and Urban Renewal throughout the United States with regional offices and regional administrators and technical staffs of all types throughout the country.

The Administrator and the Regional Administrators are advised and represented in all of their activities by a personal staff of attorneys, as well as by the United States Attorneys throughout the United States. What possible difference can it make to the Administrator in which federal court an action is brought against him. Certainly it never was contemplated by Congress that the waiver of sovereign immunity should be thwarted by having it fall into a morass of technicalities raised by its own agent for the calculated

purpose of increasing his own powers. Nor did Congress intend to destroy its own mandate of having the merits of a controversy determined by the judiciary by making it technically impossible to sue the Administrator. (*Keifer & Keifer* v. *R.F.C.*, 306 U. S. 381; *Johnson* v. *United States*, 163 F. 2d 82, 1st Circuit.)

We are one united country and the Administrator is the agent of the entire United States, the sovereign which has consented to waive its immunity, and it does violence to the purpose of that waiver if suit against the sovereign may be frustrated by "recondite procedural learning."

In *Seven Oakes* v. *Federal Housing Administration*, 171 F. 2d 947, the 4th Circuit Court of Appeals held that the statute authorizing suit against the Administrator did not limit jurisdiction to the Washington, D. C. Courts. The 2nd Circuit Court of Appeals in the case at bar has limited the jurisdiction to Washington. There is now a direct conflict between two federal appellate courts on the identical question.

As an example of the confusion and uncertainty that now exists, the same District Court Judge held in *Sogona* v. *Slusser, Public Housing Commissioner of the United States*, 124 F. Supp. 327, that service in Connecticut upon the building superintendent or manager of an apartment house owned by the Federal Housing Administration, gave jurisdiction to the District of Connecticut because "the district of Connecticut is the district where the cause of action arose and the Housing Administration was carrying on business in this district." To rationalize that conclusion with the present case Judge Anderson said there was "no showing that the Administrator was doing business in this district within the meaning of the federal venue statutes 28 U. S. C. Section 1391."

II

Question 2—The Authority To Deny Venue And Determine The Merits.

In the first instance on the motion of the Administrator to quash the service—joined in by the municipal defendants—the Court held that the venue was improper. In fact, he held that the question of venue was not before him at all because of improper service. If he was correct his authority ended.

Nevertheless, the Court dismissed the complaint on the merits because he held that the plaintiff had no "standing to sue."

That action is contrary to the settled law and the decisions of this Court. (*Blank* v. *Bitker*, 7th Circuit, 132 F. 2d 962.) *Blackmer* v. *Guerre and United States Civil Service Commission*, 190 F. 2d 427, affirmed 342 U. S. 512, where this Court and the Circuit Court of Appeals specifically said on the identical question "we do not reach the merits," in holding that service in Louisiana was improper.

In the Court of Appeals the Administrator argued the single question that the service of process could be made upon him only in Washington. It was the City of New Haven and the New Haven Redevelopment Agency that argued that even if the District Judge had exceeded his powers the judgment should nevertheless be affirmed because "it would have been a waste of judicial energy to base dismissal on any ground that would have permitted a renewed complaint in the District of Columbia". Such an extraordinary concept of judicial power, if fully exercised, would destroy the whole federal judicial system. [On the oral argument counsel admitted that the Administrator was withholding a substantial sum until the ultimate determination of this case which was causing considerable financial loss to the City of New Haven because of the necessity to borrow money privately at higher rates of interest to proceed with the project as a whole.]

This is such a departure by a lower court from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

III.

Questions 3 and 4—The Right Of Judicial Review.

Section 10 of the Administrative Procedure Act (5 U. S. C. 1009) provides:

> "Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion."
>
> "(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof."
>
> * * * * *
>
> "(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall * * * (B) hold unlawful and set aside agency action, findings and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitation, or short of statutory right (4) without observance of procedure required by law * * *."

This Court in *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U. S. 470, had occasion to consider the question of the standing of a competitor to seek review of the issuance of a license, and said:

> "Congress * * * may have been of opinion that one likely to be financially injured by the issuance of a license would be the only person having a sufficient interest to bring to the attention of the Appellate

Court, errors of law in the action of the Commission in granting the license. It is within the power of Congress to confer such standing to prosecute an appeal. We hold, therefore, that the respondent had the requisite standing to appeal and to raise in the Court below any relevant question of law in respect to the order of the Commission."

The *Sanders* doctrine was expanded in *Scripps-Howard Radio v. Federal Communications Commission*, 316 U. S. 4, and *Federal Communications Commission v. National Broadcasting Co.*, 319 U. S. 239. In the latter case, this Court, in discussing the *Sanders* case, said that despite the lack of property right "economic injury gave the existing station standing to present questions of public interest and convenience by appeal from the order of the Commission."

In *I.C.C. v. Oregon-Washington R.R. Co.*, 288 U. S. 14, in construing a statute authorizing "an appeal to the Supreme Court * * * by an aggrieved party," this Court said:

> "The section can be given effect only by holding that an aggrieved party may challenge the decree not only to vindicate his own rights but those of the United States as well."

The instant complaint alleges that the plaintiff may suffer economic destruction by reason of the establishment of an excess of hotel, banquet and restaurant facilities by the Administrator's actions, which are admittedly without foundation in any economic survey or fundamental facts adduced by the Administrator upon which the Administrator could have come to the decision that he did, and that his decision is manifestly arbitrary, capricious and a gross abuse of his discretion. If that be so substantial federal funds are being given away and loaned unlawfully.

Moreover, it is charged that the Administrator violated and exceeded the authority granted by Congress in that he admittedly delegated his authority to the New Haven Redevelopment Agency and the City of New Haven to determine

the economic feasibility of erecting a new 800 room hotel with banquet facilities for 1000 persons.

In the face of this charge, the Administrator assumes a naivete and says, "It would be bureaucratic" for him to interfere with the desires of the New Haven Municipal Authorities.

If the Administrator may be said to have the right to exceed his statutory authority, then he may create throughout the country such a surplus of hotel and restaurant facilities as to bring about the present economic destruction of those affected and lay the foundation for future urban slums and economic distress—the very thing Congress now seeks to cure and prevent.

In *Associated Industries* v. *Ickes* (134 F. 2d 694 reversed on other grounds 320 U. S. 707), the "standing" of the plaintiff as a mere consumer of coal to appeal to the Courts as an "aggrieved person" was challenged by the Administrator. The Court said:

> "The Court, in the *Sanders* and *Scripps-Howard* cases, as we understand them, construed the 'person aggrieved' review provision as a constitutionally valid statute authorizing a class of 'persons aggrieved' to bring suit in a Court of Appeals to prevent alleged unlawful official action in order to vindicate the public interest, although no personal substantive interest of such persons had been or would be invaded."

In *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, this Court said in discussing the Administrative Procedures Act:

> "More fundamental, however, was the purpose to curtail and change the practice of embodying in one person or agency the duties of prosecutor and judge."

In the instant case the Administrator is both "prosecutor and judge." He is required under the Housing Act to, and does, set up throughout the country regional offices which render advisory services to local authorities to assist them

in planning and carrying out a multitude of ideas and actions to the end that the full benefits of the intended federal aid may be used. When that is all done it would be less than human to suppose that the Administrator when challenged could impartially review what had already been decided.

More likely, as in the Attorney General's report referred to in the *Wong Yang Sung* case, he would psychologically rationalize his activities into his own preconceived ideas.

This is evident when one reads the Administrator's letter (opinion) addressed to plaintiff's counsel, which is annexed to the complaint (pp. 18a-20a, Transcript Appendix).

It is clear that Congress intended a party aggrieved by the actions of the Federal Housing Administrator could have the acts complained of reviewed not only to "vindicate his own rights" but also "those of the United States as well."

The Courts below have cited *Alabama Power Co.* v. *Ickes*, 302 U. S. 464, *Kansas City Power and Light Co.* v. *McKay*, 225 F. 2d 924, cert. denied 76 S. Ct. 137 (by the District Court), *Duke Power Co.* v. *Greenwood County*, 302 U. S. 485 and *State of Massachusetts* v. *Mellon*, 262 U. S. 447, 48 (by the Court of Appeals), in support of the holding that the plaintiff does not have "standing to sue."

These cases are not applicable. The *Alabama*, *Kansas City* and *Duke Power* cases involved entirely different principles of law. In those cases Congress had specifically authorized appropriations to permit municipalities to build power plants and sell the power in competition with the private utility companies which otherwise held a monopoly. This was a deeply rooted sociological and economic problem which affected large segments of the population. The Tennessee Valley Authority is a classic example of this type of legislation. (*Tennessee Electric Power Co.* v. *T.V.A.*, 306 U. S. 118.)

What those decisions say is that if Congress decides in the national interest that federal or federally aided competition in the public utility field should be allowed, then there has been no invasion of private property rights, and the federal grants and loans with its accompanying competition result

in no "actionable wrong" and thus no "standing" to sue exists."

The *Massachusetts* case held that a citizen taxpayer had no standing to challenge the constitutionality of an Act of Congress, as such an interest was miniscule and carried with it no personal rights which had been affected: "he suffers in some indefinite way in common with people generally." No specific action on the part of a federal agency was before the Court.

None of the foregoing cases touches the questions involved in the case at bar. The public is here confronted with the bald proposition that no matter what the Federal Housing Administrator may do—even though it be in violation of the authority granted to him by Congress—no one has the "standing" to challenge his actions by judicial review. After all the basis of most complaints by business men are that they will be hurt by the "competition" which the federal agency has created. The question is whether that competition has been lawfully created by Congress. That Congress did not intend to create lawful competition in a real sense by the use of Federal Housing funds is self-evident. That is contrary to the whole philosophy of the federal housing program a part of which now includes urban slum correction and prevention. Nor did Congress intend to abdicate its legislative functions and public policy determinations to its own appointee. If it did, then the Act is unconstitutional for it then becomes a taking of property without due process of law, which violates the Fifth Amendment to the United States Constitution. A taking of property by indirection is just as much a taking and subject to the same constitutional prohibition.

IV

Question 5—Does Sec. 1731 (b) 12 U. S. C. Prohibit The Use Of Federal Housing Funds To Erect Hotels.

Sec. 1731 (b) of 12 U. S. C. provides:

> "The Congress hereby declares that it has been its intent since the enactment of the National Housing Act that housing built with the aid of mortgages insured under this Act is to be used principally for residential use, and that this intent excludes the use of such housing for transient or hotel purposes while such insurance on the mortgage remains outstanding."

There is no distinction in principle between Congressional prohibition against the use of F.H.A. mortgage insurance financing (credit) for the erection of a hotel and the use of F.H.A. funds to accomplish the same thing through the medium of the F.H.A. supplying the money to pay for two-thirds of the cost of acquiring the land upon which the hotel is to be erected.

Congress does not want private hotels erected with the use of federal money or federal credit.

This is clear from the strong enforcement position Congress took in passing on August 2, 1954, Public Law 560 (United States Statutes at large; 83rd Congress, pp. 610-612), Sec. 513(a) of which became Sec. 1731 (b) of 12 U. S. C.

This was specifically brought up in the House when the National Housing Act of 1956 was being debated (Congressional Record, July 25, 1956).

It has been reported in the public press of July 23rd, 1958 (the New Haven "Register" and the New York "Times") that the Sheraton Hotel Corporation has agreed to operate this new hotel under lease from the developer of the project who is purchasing, at the discounted price, the land from the City of New Haven.

As pointed out to the Administrator in the letter of October 9, 1957, attached to the complaint, the Sheraton Hotel

Corp., after a survey made by them abandoned their own plans to build a new hotel in New Haven (p. 17(a), Transcript Appendix). Now they have agreed to operate the new hotel as lessee.

It needs no extended argument to differentiate between the financial obligations of an owner of a hotel using his own capital to build and operate a commercial hotel, from that of a lessee. The Sheraton Hotel Corp. has now been able to acquire for their hotel purposes the choicest piece of land in the City of New Haven, because of the power of condemnation of the City of New Haven and the federal funds to be advanced to pay for two-thirds of the land thus acquired. This result is directly contrary to the expressed congressional policy.

Hotel construction was the subject of an article in "Business Week" of February 14, 1959 entitled "They're Building Hotels Again". "Coast to coast, new hotels—mostly belonging to chains—are rising for the first time since the 1920's". The reason, as stated, "lies in a 1954 change in internal revenue laws" which now allows "new hotels to take double depreciation on a declining balance". Mr. Ernest Henderson, president of the Sheraton Hotel Corp. explains "what Uncle Sam loses in early years he makes up in later years. On balance, he wins heavily because new hotels are being built that might otherwise not be built."

The Administrator avoids this by stating:

> "Federal loan and grant funds are made available for planning a redevelopment project and for carrying out through the stages of clearance, preparation of the project site, and its disposition to the redeveloper at a price not less than its fair market value for the use or uses provided in the redevelopment plan. No Federal funds are made available in the form of either loans or grants to a private redeveloper." (p. 19(a), Transcript Appendix.)

Congress never intended that its policy, so clearly stated, should be circumvented by such cavalier reasoning on the part of its own agent, who has thus by his own fiat vastly extended his own power and authority.

No matter how masked, this use of federal funds is for a private purpose unrelated to the Housing Act. It is much worse, it is a taking by the United States of private property without compensation, in violation of the Fifth Amendment.

CONCLUSION

There is concerned here a case failing to vindicate constitutional promises by introducing far reaching innovations in the interpretation of the authority granted to a federal agency by Congress; a case in which the decision is in conflict with a decision of another Court of Appeals; important questions of Federal law which have not been, but should be settled by this Court, and a decision on federal questions in conflict with applicable decisions and standards of this Court. All of the foregoing are substantial and of such general importance in the public interest as to call for an exercise of this Court's power of supervision.

Dated: Norwalk, Connecticut, February 25, 1959.

Respectfully submitted,

LEO E. SHERMAN,
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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 92—October Term, 1958.

(Argued December 2, 1958 Decided December 31, 1958.)

Docket No. 25230

THE TAFT HOTEL CORPORATION,

Plaintiff-Appellant,

—v.—

HOUSING AND HOME FINANCE AGENCY, ALBERT M. COLE, Administrator of the Housing and Home Finance Agency, FRANK O'BRION, HARRY BARNET, ANDREW EUSTON, FRED W. WATERMAN, JR., MATTHEW RICOPPOLO constituting the New Haven Redevelopment Agency and the CITY OF NEW HAVEN,

Defendants-Appellees.

Before: SWAN, MEDINA and WATERMAN,

Circuit Judges.

Appeal from a judgment of the United States District Court for the District of Connecticut, Anderson, *J.*, dismissing the action for lack of jurisdiction and awarding defendants their costs. Affirmed.

LEO E. SHERMAN, Norwalk, Conn., *Attorney for Appellant.*

HARRY W. HULTGREN, JR., U. S. Attorney and W. Paul Flynn, Assistant U. S. Attorney, *for Housing and Home Finance Agency and Albert W. Cole, Administrator, Appellees.*

GUMBART, CORBIN, TYLER & COOPER, *Attorneys for Frank O'Brion et al. and the City of New Haven, Appellees.*

PER CURIAM:

Plaintiff's action seeks a determination that Housing and Home Finance Agency and Albert W. Cole, Administrator of said Agency, acted illegally in approving New Haven's Redevelopment Project, insofar as it includes the erection of a 300 room air conditioned hotel. It seeks also a mandatory injunction restraining said Agency and Administrator from furnishing any financial assistance to the Redevelopment Agency of the City of New Haven in furtherance thereof.

Judge Anderson's opinion is reported in 162 F. Supp. 53. He held that the statutes do not authorize Housing and Home Finance Agency, as distinct from its Administrator, to sue or be sued. We agree.[1] He held further that service of process upon the Administrator in Washington, D. C. did not bring him before the District Court for the District of Connecticut. With this also we agree.[2] Finally he held that plaintiff has no cause of action against the local defendants because it has no standing to sue either as a taxpayer or as

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[1] See *Blackmar* v. *Guerre*, 342 U. S. 512; *New Haven Public Schools* v. *General Services Administration*, 7 Cir. 214 F. 2d 592.

[2] See *Blank* v. *Bitker*, 7 Cir. 185 F. 2d 962.

person who may sustain economic loss through competition. This too is correct.[3] Economic loss stemming from lawful competition, even though made possible by federal aid, is *damnum absque injuriam*.

Judgment affirmed.

APPENDIX B

Fifth Amendment to the Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Statutes Involved

§ 1451 of 42 U. S. C. Local programs—Local responsibilities considered By Administrator in extending financial assistance

(a) In entering into any contract for advances for surveys, plans, and other preliminary work for projects under this subchapter, the Administrator shall give consideration to the extent to which appropriate local public bodies have undertaken positive programs (through the adoption, modernization, administration, and enforcement of housing, zoning, building and other local laws, codes and regulations relating

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[3] *Massachusetts* v. *Mellon*, 262 U. S. 447, 487; *Alabama Power Co.* v. *Ickes*, 302 U. S. 464, 479; *Duke Power Co.* v. *Greenwood County*, 302 U. S. 485; *Kansas City Power and Light Co.* v. *McKay*, D. C. Cir. 225 F. 2d 924, cert. den. 350 U. S. 884.

to land use and adequate standards of health, sanitation and safety for buildings, including the use and occupancy of dwellings) for (1) preventing the spread or recurrence in the community of slums and blighted areas, and (2) encouraging housing cost reductions through the use of appropriate new materials, techniques, and methods in land and residential planning, design, and construction, the increase of efficiency in residential construction, and the elimination of restrictive practices which unnecessarily increase housing costs.

Encouragement of operations of local public agencies

(b) In the administration of this subchapter, the Administrator shall encourage the operations of such local public agencies as are established on a State, or regional (within a State) or unified metropolitan basis or as are established on such other basis as permits such agencies to contribute effectively toward the solution of community development or redevelopment problems on a State, or regional (within a State) or unified metropolitan basis.

Requirements; exceptions; prohibition against delegation of certain functions

(c) No contract shall be entered into for any loan or capital grant under this subchapter, or for annual contributions or capital grants pursuant to the United States Housing Act of 1937, as amended, for any project or projects not constructed or covered by a contract for annual contributions prior to August 1, 1956, and no mortgage shall be insured and no commitment to insure a mortgage shall be issued under section 1715k or 1715l of Title 12, unless (1) there is presented to the Administrator by the locality a workable program (which shall include an official plan of action, as it exists from time to time, for effectively dealing with the problem of urban slums and blight within the community and for

the establishment and preservation of a well-planned community with well-organized residential neighborhoods of decent homes and suitable living environment for adequate family life; for utilizing appropriate private and public resources to eliminate, and prevent the development or spread of, slums and urban blight, to encourage needed urban rehabilitation, to provide for the redevelopment of blighted, deteriorated, or slum areas, or to undertake such of the aforesaid activities or other feasible community activities as may be suitably employed to achieve the objectives of such a program, and (2) on the basis of his review of such program, the Administrator determines, that such program meets the requirements of this subsection and certifies to the constituent agencies affected that the Federal assistance may be made available in such community: *Provided*, That this sentence shall not apply to the insurance of, or commitment to insure, a mortgage under section 1715k of Title 12, if the mortgaged property is in an area referred to in clause (A) (i) of paragraph (1) of subsection (d) of said section, or under section 1715l of Title 12, if the mortgaged property is in a community referred to in clause (2) of subsection (a) of said section: *And provided further*, that, notwithstanding any other provisions of law which would authorize such delegation or transfer, there shall not be delegated or transferred to any other official (except an officer or employee of the Housing and Home Finance Agency serving as Acting Administrator during the absence or disability of the Administrator or in the event of a vacancy in that office) the final authority vested in the Administrator (i) to determine whether any such workable program meets the requirements of this subsection, (ii) to make the certification that Federal assistance of the types enumerated in this subsection may be made available in such community, (iii) to make the certifications as to the maximum number of dwelling units needed for the relocation of families to be displaced as a result of governmental action in a community and who would be eligible to rent or purchase dwelling accommodations in properties covered by mortgage

insurance under Section 1715l of Title 12, or (iv) to determine that the relocation requirements of Section 1455(c) of this title have been met.

Facilities for furnishing urban renewal service and assembly of information

(d) The Administrator is authorized to establish facilities (1) for furnishing to communities, at their request, an urban renewal service to assist them in the preparation of a workable program as referred to in the subsection (c) of this section and to provide them with technical and professional assistance for planning and developing local urban renewal programs, and (2) for the assembly, analysis and reporting of information pertaining to such programs. July 15, 1949, c. 338, Title I, § 101, 63 Stat. 414; Aug. 2, 1954, c. 649, Title III, § 303, 68 Stat. 623; Aug. 11, 1955, c. 783, Title I, § 108(a), 69 Stat. 638; Aug. 7, 1956, c. 1029, Title IV, § 402, 70 Stat. 1103.

Sec. 1391(b) of 28 U. S. C. and Sec. 1456(c)1 of 42 U. S. C. are printed at page 5 of the petition; Sec. 1009 of 5 U. S. C. (Sec. 10 Administration Procedures Act) at page 9 and Sec. 1731(b) of 12 U. S. C. at page 14.

Certificate of Service

I, LEO E. SHERMAN, counsel for petitioner in the foregoing petition for a writ of certiorari, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 27th day of February, 1959, I served copies of the foregoing petition for a writ of certiorari on the Solicitor General, Department of Justice, Washington 25, D. C. The Housing and Home Finance Agency, Washington 25, D. C., Harry W. Hultgreen, Jr., Esq., United States Attorney for the District of Connecticut, Federal Building, New Haven, Conn., and upon Gumbart, Corbin, Tyler & Cooper, Esqs., 205 Church Street, New Haven, Conn., Attorneys for the Respondents, Frank O'Brion, et al., constituting the New Haven Redevelopment Agency and the City of New Haven, by causing copies thereof to be mailed in duly addressed envelopes, with postage prepaid.

Dated, February 27, 1959.

LEO E. SHERMAN,
Counsel for Petitioner.

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FILED
MAR 31 1959
JAMES R. BROWNING, Clerk

No. 754

In the Supreme Court of the United States

OCTOBER TERM, 1958

THE TAFT HOTEL CORPORATION, PETITIONER

v.

HOUSING AND HOME FINANCE AGENCY, ALBERT W. COLE, Administrator of the Housing and Home Finance Agency, FRANK O'BRION, HARRY BARNET, ANDREW EUSTON, FRED W. WATERMAN, JR., MATTHEW RICOPPOLO, Constituting the New Haven Redevelopment Agency and the CITY OF NEW HAVEN

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE RESPONDENTS HOUSING AND HOME FINANCE AGENCY AND ALBERT W. COLE IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

GEORGE COCHRAN DOUB,
Assistant Attorney General,

SAMUEL D. SLADE,
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Washington 25, D. C.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE RESPONDENTS HOUSING AND HOME FINANCE AGENCY AND ALBERT W. COLE IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the District of Connecticut (R. 21a-22a) is reported at 162 F. Supp. 538. The opinion of the United States Court of Appeals for the Second Circuit (Pet. App. 1a-3a) is reported at 262 F. 2d 307.

JURISDICTION

The judgment of the Court of Appeals was entered on December 31, 1958 (R. 36a). The petition for a writ of certiorari was filed on March 6, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether service of process in Washington on the Administrator for the Housing and Home Finance Agency gave the District Court in Connecticut jurisdiction over him.

2. Whether the Housing and Home Finance Agency, as distinct from the Administrator of the Agency, may sue and be sued.

3. Whether petitioner, whose sole alleged injury is a potential loss of profits from economic competition, has standing to maintain an action to test the legality, and enjoin the payment, of a federal loan and grant to a local slum clearance authority.

STATUTE AND RULE INVOLVED

42 U.S.C. 1456(c)(1) provides in part as follows:

> (c) * * *
>
> In the performance of, and with respect to, the functions, powers, and duties vested in him by this subchapter, the Administrator, notwithstanding the provisions of any other law, may—
>
> 1. sue and be sued;
>
> * * * * *

Rule 4(f), Federal Rules of Civil Procedure, provides in pertinent part:

(f) Territorial Limits of Effective Service. All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held and, when a statute of the United States so provides, beyond the territorial limits of that state. * * *

STATEMENT

This action was brought by the petitioner, a Connecticut corporation which owns and operates the Taft Hotel in New Haven, Connecticut (R. 3a). The complaint alleged that the Housing and Home Finance Agency (HHFA) had approved a plan for federally-assisted slum clearance and urban redevelopment in New Haven and that the plan provided for the resale of a portion of the project land to a private hotel developer (R. 4a). The petitioner complained that the construction of the new hotel would cause it "severe financial loss" (R. 8a) and, accordingly, prayed that the Administrator be enjoined "from furnishing any financial assistance" to the New Haven redevelopment authorities (R. 10a).

Copies of the summons and complaint were served upon Albert W. Cole, Administrator of the Housing and Home Finance Agency, in the District of Columbia (R. 21a). Mr. Cole thereupon moved to dismiss the action as to him, or to quash the return of service, on the grounds that he had not been properly served (R. 27a). Respondent Housing and Home Finance Agency also moved to dismiss the complaint, on the grounds that it failed to state a claim upon which relief could be granted, that there was no justiciable controversy, and that the District Court lacked jurisdiction over the Agency (R. 26a).

The District Court dismissed the action for lack of jurisdiction (R. 21a-23a). It held, first of all, that the court lacked jurisdiction over Mr. Cole because he had not been served with process within "the state in which the district court is held. Rule 4(f), Federal Rules of Civil Procedure." (R. 21a.) It held, further, that the court also lacked jurisdiction over the HHFA because Congress has not authorized the agency "as distinct from the administrator, to sue or be sued." (R. 22a.) As an additional ground for dismissal, the court held that the petitioner lacked standing to maintain the action either as a taxpayer or as a person who may sustain economic loss through competition (R. 22a). The Court of Appeals, *per curiam*, affirmed (Pet. App. 1a-3a).

ARGUMENT

The court below held that the District Court lacked jurisdiction over the federal defendants and, in addition, that the petitioner lacked standing to maintain this action. That decision is clearly correct, and further review by this Court is not warranted.

1. Congress has provided that the Administrator of the agency, as distinguished from the agency itself, may sue and be sued in connection with the performance of his agency duties, 42 U.S.C. 1456 (c) (1) (*supra*, p. 2). Accordingly, an action properly brought may be maintained against the Administrator. But the present action was not properly brought, for the Administrator was not served with process within the State of Connecticut and, conse-

quently, the District Court for the District of Connecticut had no jurisdiction over him.

Rule 4(f) of the Federal Rules of Civil Procedure provides that process, to be effective, must be served within the borders of the state in which the District Court is held except where a federal statute provides otherwise. And as the District Court below correctly observed, there is no federal statute authorizing the service of process upon the Administrator outside that territorial limit (R. 21a-22a). The petitioner suggests that the "sue and be sued" clause creates a statutory exception to the general rule, and contends that the decision by the court below conflicts with the holding of the Fourth Circuit Court of Appeals in *Seven Oaks* v. *Federal Housing Administration*, 171 F. 2d 947 (Pet. 5-7). Examination of the *Seven Oaks* decision shows the petitioner's reliance, in this respect, to be misplaced. There, the major premise was "* * * that the court in which suit is brought be able to acquire jurisdiction over the defendant by service of its process * * *" (p. 949). But where, as here, the District Court's process was not effectively served upon the respondent, the court cannot have acquired jurisdiction over him.

2. With respect to the dismissal of the action against the Housing and Home Finance Agency, the courts below were also correct. The Housing and Home Finance Agency, which was established by Reorganization Plan No. 3 of 1947, 12 F. R. 4981, 61 Stat. 954, 5 U.S.C. 133y, is an unincorporated agency of the United States. Congress has not empowered

it to sue, or permitted it to be sued. Cf. *Blackmar* v. *Guerre*, 342 U.S. 512, 515. To be sure, the opinions below appear inconsistent on this point with that of the Fourth Circuit in *Seven Oaks* v. *Federal Housing Administration*, 171 F. 2d 947, where, dealing with a different statute, that court held that statutory permission for suit against the Federal Housing Administrator constituted authority for suit against the Federal Housing Administration. Since the Fourth Circuit did not discuss the basis for its holding it is not possible to know whether it was based on the structure or legislative history of the particular act or whether it enunciated some general rule. In any event the only service which was effected in the present case was on the Administrator in Washington,[1] so that clearly there was no jurisdiction over the Agency in Connecticut.

3. The only injury which petitioner alleges is that it will suffer "economic destruction by reason of the establishment of an excess of hotel, banquet and restaurant facilities * * *" in the New Haven area (Pet. 10). But, as the court below held, consonant with numerous decisions by this Court, and by the courts of appeals, such economic loss does not constitute legal injury. *Tennessee Electric Power Co.* v. *T.V.A.*, 306 U.S. 118; *Duke Power Co.* v. *Greenwood County*,

[1] In his petition, petitioner refers to the fact that process was served on the United States Attorney in Connecticut. There is nothing in the provisions establishing the Housing and Home Finance Agency or in the statutes generally which would transform service on the United States Attorney into service on the agency here involved.

302 U.S. 485; *Alabama Power Co.* v. *Ickes*, 302 U.S. 464; *Benson* v. *Schofield*, 236 F. 2d 719, 722 (C.A. D.C.), certiorari denied, 352 U.S. 976; *Allied-City Wide* v. *Cole*, 230 F. 2d 827 (C.A. D.C.); *Kansas City Power and Light Co.* v. *McKay*, 225 F. 2d 924 (C.A. D.C.), certiorari denied, 350 U.S. 884. Cf. *Allen* v. *Grand Cent. Aircraft Co.*, 347 U.S. 535, 539-541.

The petitioner attempts to distinguish the Power Company cases on the ground that the proposed use of federal funds had been authorized by Congress, whereas the present loans and grants for urban redevelopment and slum clearance are not (Pet. 12-13). Obviously, though, whether the action taken by the federal officials was proper or not is altogether irrelevant to the threshhold issue of standing to challenge the action. This is strikingly apparent from this Court's statement of the issue in *Alabama Power Co.* v. *Ickes*, *supra*: whether "anyone who will suffer injurious consequences from the lawful use of money about to be unlawfully loaned [may] maintain a suit to enjoin the loan" (p. 480). The holding of that case, *i.e.* that the local power company had not been legally wronged regardless of the legality of the federal loan, wholly disposes of the petitioner's untenable distinction.

Similarly untenable is the petitioner's reliance upon decisions construing regulatory statutes which, by their terms, broaden the group of persons who may appeal administrative decisions.[2] And the petition-

[2] The plaintiffs in *F.C.C.* v. *National Broadcasting Co.*, 319 U.S. 239, *Scripps-Howard Radio* v. *Comm'n*, 316 U.S. 4, and *F.C.C.* v. *Sanders Bros. Radio Station*, 309 U.S. 470,

er's suggestion that Section 10(a) of the Administrative Procedure Act, 5 U.S.C. 1009, enlarges the class of persons who have standing to challenge administrative actions is refuted by the terms of that section which merely declare pre-existing case law concerning standing to sue. *Atchison, Topeka and Santa Fe Ry. Co.* v. *United States*, 350 U.S. 892, affirming 130 F. Supp. 76; *Kansas City Power and Light Co.* v. *McKay*, 225 F. 2d 924, 932 (C.A. D.C.).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

GEORGE COCHRAN DOUB,
Assistant Attorney General.

SAMUEL D. SLADE,
SETH H. DUBIN,
Attorneys.

MARCH, 1959

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acquired standing by the terms of Section 402(b) of the Federal Communications Act, 47 U.S.C. 402(b). In *Associated Industries* v. *Ickes*, 134 F. 2d 694 (C.A. 2), reversed on other grounds, 320 U.S. 707, standing was based upon Section 6(b) of the Bituminous Coal Act of 1937, 15 U.S.C. 836(b), expired August 21, 1943, 57 Stat. 81.

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In the

Supreme Court of the United States

OCTOBER TERM 1958

No. 754

THE TAFT HOTEL CORPORATION
Petitioner

vs.

HOUSING & HOME FINANCE AGENCY, ALBERT W. COLE, ADMINISTRATOR OF THE HOUSING & HOME FINANCE AGENCY, FRANK O'BRION, HARRY BARNETT, ANDREW EUSTON, FRED W. WATERMAN, JR., MATTHEW RUPPOLO, constituting the New Haven Redevelopment Agency and the City of New Haven
Respondents

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

WILLIAM R. MURPHY,
Counsel for Respondents Frank O'Brion et al constituting The New Haven Redevelopment Agency and the City of New Haven, 205 Church Street, New Haven, Connecticut

THE WHAPLES-BULLIS CO., NEW HAVEN, CONNECTICUT

In the

Supreme Court of the United States

OCTOBER TERM 1958

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Respondents

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

OPINIONS BELOW

The opinion below of the Court of Appeals for the Second Circuit is reported at 262 F. 2d 307 and of the United States District Court for the District of Connecticut at 162 Federal Supplement 538.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTION PRESENTED

Was the trial court correct in dismissing this action for want of jurisdiction where the plaintiff, as a taxpayer and hotel operator, sought to enjoin federal urban renewal grants in aid of a redevelopment project which would include a competing hotel?

STATUTES INVOLVED

The statutes involved are set forth in the petition and Appendix B to the petition.

STATEMENT OF THE CASE

Plaintiff is a hotel operator in New Haven, Connecticut. The defendants are (a) the United States Housing and Home Finance Agency and its Administrator, and (b) the City of New Haven, Connecticut and its Redevelopment Agency (hereinafter called the local defendants). The complaint alleged that the plaintiff would be unreasonably harmed by competition from a new hotel proposed to be built in the New Haven Church Street Redevelopment Area and sought an injunction against allegedly unlawful federal loans and grants for this redevelopment project.

These local defendants moved to dismiss the action under Rule 12 of the Federal Rules of Civil Procedure on the ground that the complaint failed to state a claim upon which relief could be granted because the plaintiff had no standing to sue, either as a taxpayer or as a person who may sustain economic loss through competition. The motion was granted and the ensuing judgment was affirmed in the Court of Appeals.

This is the only question in the case in which the local defendants are interested. It encompasses the matters stated in paragraphs 3, 4 and 5 of the petitioner's statement of questions presented. The so-called "venue" question, which is actually a question of personal jurisdiction, involves the federal defendants only.

ARGUMENT

1. *The Decision Below Was Clearly Correct.* The holding of the district court and the Court of Appeals that plaintiff had no standing to sue necessarily followed from the decisions of this court in *Massachusetts* vs. *Mellon*, 262 U. S. 447 (taxpayer) and *Alabama Power Company* vs. *Ickes*, 302 U. S. 464 (economic competitor). In the latter case, this court answered in the negative this "ultimate question":

> "Can anyone who will suffer injurious consequences from the lawful use of money about to be unlawfully loaned maintain a suit to enjoin the loan?"
>
> 302 U. S. 464, 480.

This question was properly raised in the trial court by the local defendants, as to whom there was admittedly proper venue and personal jurisdiction. Since the judgment must be sustained on this ground, the Court of Appeals was manifestly correct in affirming.

2. *There Is No Conflict Of Decisions.* The petition does not allege that there is any conflict of decisions on the standing to sue point which would justify grant of certiorari. The only other circuit court decision cited below was *Kansas City Power & Light Company* vs. *McKay*, 225 F. 2d 924 (D. C. Cir. 1955) *cert. denied* 350 U. S. 884, which is in complete accord.

3. *There Is No Important Question Of Federal Law.* In the petition we identified two questions of federal law bearing upon the merits, neither of which is so important or unsettled as to warrant review in this court.

(a) It is claimed that the Administrative Procedure Act gives plaintiff the right to seek judicial review of the Housing Administrator's decision approving the loan and grant contract with the local defendants. The pertinent language of the Act is as follows:

> "Except so far as . . . (2) agency action is by law committed to agency discretion any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof."
>
> 5 U. S. C. 1009.

Insofar as it is claimed that the Administrative Procedure Act itself enlarged the class of persons who are entitled to judicial review the petition is supported by no authority and is contrary to *Atcheson, Topeka and Santa Fe Railway Co.* vs. *United States*, 305 U. S. 892 (1955) affirming 130 F. Supp. 76 and *Kansas City Power & Light Company* vs. *McKay*, 225 F. 2d 924 (D. C. Cir. 1955) *cert. denied* 350 U. S. 884.

(b) The claim that Section 1731(b) of 12 United States Code forbids the use of federal funds for slum clearance if one of the planned reuses is the erection of a new hotel by private capital is frivolous. The statute, which has to do with mortgage insurance under the National Housing Act, has on its face nothing whatsoever to do with federal aid for slum clearance. In fact the legislative history of the Housing Act of 1956 demonstrates that Congress rejected an attempt to write such a limitation into Section 110(b) of the Housing Act of 1949, now 42 USC 1460b; see House Report No. 2363 June 15, 1956 to accompany H. R. 11742 U. S. Code Congressional and Administrative News, 84th Congress, Second Session 1956, Volume 3, pages 4536, 4569. Moreover, plaintiff is not in a protected class by virtue of this legislation and has no standing to sue because of it.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

WILLIAM R. MURPHY,
Counsel for Respondents.

March 30, 1959.

CUMBART, CORBIN, TYLER & COOPER,
205 Church Street,
New Haven, Connecticut.

CERTIFICATE OF SERVICE

I, William R. Murphy, counsel for respondent, in opposition to the petition for a writ of certiorari and a member of the bar of the Supreme Court of the United States do hereby certify that on the 1st day of April, 1959, I served copies of the foregoing brief in opposition to the petition for a writ of certiorari upon the petitioner by mailing a copy thereof, postage prepaid, to Leo E. Sherman, Esquire, Muller Avenue, Norwalk, Connecticut, and upon the other parties by mailing copies thereof to the Solicitor General, Department of Justice, Washington 25, D. C., The Housing & Home Finance Agency, Washington 25, D. C., Harry W. Hultgren, Jr., Esquire, United States Attorney for the District of Connecticut, Federal Building, New Haven, Connecticut.

WILLIAM R. MURPHY,
Counsel for Respondents.